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## Administrative Law: Current Progress of Native American Broadcasting--Status of Indian Ownership

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## NOTES AND COMMENTS

### ADMINISTRATIVE LAW: CURRENT PROGRESS OF NATIVE AMERICAN BROADCASTING—STATUS OF INDIAN OWNERSHIP

*Bonnie Schomp*

#### *Existing Indian Broadcasting Stations*

One of the least recognized minorities in radio and television broadcasting in the United States is the American Indian. According to a survey by the National Indian Education Association, there are no television stations owned by Indians or Indian groups, and none exhibiting Indian programming to any extent.<sup>1</sup> In fact, the first black-owned and operated television station, WGPR in Detroit, only began service in October, 1975.<sup>2</sup>

The total number of commercial AM and FM radio stations in this country is 7,105.<sup>3</sup> Minority licensees hold only 22 licenses, less than .003 per cent.<sup>4</sup> The National Indian Education Association survey reports only four radio stations with fulltime Indian programming. They are KYUK, licensed to Bethel Broadcasting, Inc., in Bethel, Alaska; KEYA-FM, licensed to the Couture School Board District No. 27 of Rolette County in Belcourt, North Dakota; KIPC, licensed to the Albuquerque Public Broadcasting Corporation in New Mexico; and KTDB-FM, licensed to the Ramah Navajo School Board, Inc., in Ramah, New Mexico.<sup>5</sup> The Federal Communications Commission reports two other radio stations with primary interest held by Indian groups: KHAC, licensed to the Navajo Bible School and Mission, Inc., in Window Rock, Arizona, and KNCC-FM, licensed to the Navajo Community College in Tsaille, Arizona.

Section 308(a) of the Communications Act of 1934 gives the Federal Communications Commission authority to grant station licenses, modifications, or renewals.<sup>6</sup> Each applicant for a license must satisfy the qualification standards established by statute and the Commission's rulings. The statutory requirements for licensees are set forth in Sections 309(a), 310(a) and 313 of the Communications Act.

Section 309(a) requires that the Commission be able to ascertain that the public interest will be served by granting the license.<sup>7</sup> Section 310(a) prohibits the FCC from granting a license to any alien, foreign government, or any corporation organized under the laws of any foreign government.<sup>8</sup> Section 313 provides that should a court

find a party guilty of violation of the antitrust laws, it may revoke any broadcasting license held by the party.<sup>9</sup>

Any joint enterprise must establish itself as a legal entity before it can qualify for a broadcasting license.<sup>10</sup> Furthermore, Emery reports that the Commission places great importance on the character of an applicant by reason of the fact that the use of a publicly owned channel is in the nature of public trust.<sup>11</sup> Therefore, honesty, reliability, morality, and financial and social responsibility are all considered in granting licenses.<sup>12</sup> In addition, there are financial qualifications which must be fulfilled.<sup>13</sup>

When an applicant realizes these requirements, the Commission may grant the license. But when, as is the general rule considering the limited number of broadcasting frequencies, an applicant is in competition for a license for a facility, he must show in addition that he has superior qualifications and that his proposals will better serve the public interest than any other applicant.<sup>14</sup> In order to make this determination, the Federal Communications Commission must establish additional criteria for applicants. The purpose of this note is to establish that one such qualification should be the minority nature of the applicant.

### *Support of Minority Ownership in Broadcasting*

The Commission is authorized to establish additional licensing criteria by Section 309 of the Communications Act, which provides that the “. . . Commission shall determine . . . whether the public interest, convenience, and necessity will be served . . . upon examination of such application and upon consideration of such other matters as the Commission may officially notice. . . .”<sup>15</sup> The courts have held that affording “. . . favorable consideration to an applicant who . . . in good faith as broadening community representation, gives a local minority group media entrepreneurship . . .” would be consistent with the Commission’s “primary objective of maximum diversification of ownership of mass communications media.”<sup>16</sup> The Native American minority group has, until recently, been a silent minority, and the courts have voiced the opinion that, as such, they should have a stake in broadcasting on the radio and television frequencies.<sup>17</sup>

In order to foster programming which will be responsive to the needs of the Indian community, Indian ownership and participation is a relevant factor.<sup>18</sup> In *Garrett Broadcasting Service v. FCC*, the court remanded the case of WEUP to the Review Board because the Review Board failed to give WEUP’s minority nature any weight whatsoever. In their initial opinion, the Review Board reasoned that

WEUP did not independently demonstrate that its minority oriented programming would surpass that of other stations. The court said that black ownership and participation, of themselves, give reasonable expectation of programming that is receptive to the requirements of the minority community.<sup>19</sup>

The demands of public interest in any community are the chief considerations of the Commission in granting licenses.<sup>20</sup> It is the contention of this writer that these demands in the Indian community have been long neglected and can be best served by Indian ownership in broadcasting. The needs of Native American communities are distinctive from those of white communities and each Indian community has highly specified needs, differing even from other Indian communities.<sup>21</sup>

In the application of Bethel Broadcasting, Inc., for a license for station KYUK, the needs and problems of the Indian community were described.<sup>22</sup> The service area includes mostly Alaskan Eskimos. The station broadcasts in both Eskimo and English because many people in the area speak only Yupik Eskimo.<sup>23</sup> The licensee proposed to make available employment information, a precious commodity as seen from the fact that only 5.4 per cent of the native population were permanently employed.<sup>24</sup> KYUK would also provide the only coverage of local and regional news for the area and provide a native language station for voter and civic information to aid the Eskimo population in undertaking the full responsibility of citizenship.<sup>25</sup> The licensee also proposed to encourage the natives to maintain their pride in a culture that has survived thousands of years.<sup>26</sup>

The Albuquerque Public Broadcasting Corporation proposed to broadcast in English, Spanish, and the five basic Pueblo Indian languages over station KIPC.<sup>27</sup> The stated purposes in operating the broadcasting facility are to improve communications between all Pueblo people, to inform all Indians of opportunities which could improve the conditions of the Indian community, to improve Indian cultural definition, and to increase the knowledge of non-Indian audiences about Pueblo Native Americans.<sup>28</sup>

### *Obstacles to Obtaining Minority Broadcast Ownership*

The number of broadcasting frequencies is restricted; consequently, most minority applications are in competition with other applicants for the same facility. Any interest group or individual may file a petition to deny a license renewable with the Federal Communications Commission.<sup>29</sup> In the 1970's the majority of such petitions have been filed by minority groups seeking increased coverage,

access, and advisory roles for their share of the service area. With few exceptions, these petitions have been rejected.<sup>30</sup>

In the 1975 *Garrett* case, Garrett urged that the Commission should give careful attention to the minority ownership and minority operation of WEUP.<sup>31</sup> However, the administrative law judge made no mention of that factor in his decision, and the Review Board dismissed the matter as “without decisional significance.”<sup>32</sup> This position of the Commission was also set out in the *Mid-Florida Television Corporation* case.<sup>33</sup> It was held that “. . . Black ownership cannot and should not be an independent comparative factor . . .” and that “. . . Black ownership . . . is decisionally significant only when reflected in active participation in station affairs.”<sup>34</sup> In the same decision it was held that “[u]nless [the applicant] showed that the participation of [minorities] in the operation of the station would use their experience, background, and knowledge of the community in a way likely to result in a superior service, it cannot prevail on this point. . . .”<sup>35</sup>

More recently, the Federal Communications Commission expressed the opinion that encouraging assignment to minority owners is in violation of Section 310(b) of the Communications Act of 1934 which bars the Commission from considering whether a transfer of ownership to one other than the applicant would serve the public interest.<sup>36</sup>

Another rationalization for the Commission’s hesitancy to actively encourage minority ownership was voiced in the *Mid-Florida* case.<sup>37</sup> The Review Board reiterated the reasoning in the *Chapman Radio & Television Co.*<sup>38</sup> decision that the “. . . Communications Act, like the Constitution, is color blind. What the Communications Act demands is service to the public . . . and that factor alone must control the licensing processes, not the race, color, or creed of an applicant.”<sup>39</sup> Senior Circuit Judge Fahy said that this analysis was inadequate to dispose of the issue as failing to fully describe the scope of criteria of public interest set forth by the Communications Act.<sup>40</sup> The Commission has discretion to consider licensing standards that are not clearly expressed in the Constitution. “Inconsistency with the Constitution is not to be found in a view of our developing national life which accords merit to [minority] participation among principals of applicants for television rights.”<sup>41</sup>

### *Current Efforts to Encourage Minority Broadcasting*

An exception to the Federal Communications Commission’s consistent refusal to look to minority ownership of broadcasting facilities

is found in a series of dissenting opinions by Commissioner Benjamin Hooks. Commissioner Hooks was nominated by President Richard Nixon in 1972.<sup>42</sup> He answered the Commission's query of conforming preference of minority ownership with Section 310 in his dissent in the Commission's decision on *Amendment of Commission Rules Relating to Multiple Ownership of Standard, FM, and TV Stations*.<sup>43</sup> "The courts have told us . . . that the Commission must take steps to integrate minorities into broadcast ownership."<sup>44</sup> Commissioner Hooks expressed the opinion that the law allows the Commission to disencumber minority acquisition of facilities where divestiture of facilities is required by the Commission's antimonopolistic policies by setting forth qualifications for assignees of these divested stations which will emphasize minority ownership.<sup>45</sup> Such divestiture proceedings offer an ideal opportunity to further minority broadcast ownership.

Section 310 merely prohibits [the Commission] from considering the 'disposal of the . . . license to a person other than [that] proposed' by the licensee. . . . It does not bar us from adopting general qualifications for all assignees . . . ; only from considering other parties not selected by the licensee who first meet our specified criteria. . . .<sup>46</sup>

Commissioner Hooks's position that minority ownership of broadcasting facilities should be viewed as desirable by the Commission has been sanctioned by the federal courts.<sup>47</sup> The consequence of these opinions is better understood when considering the court's function in ruling on FCC policy. "Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vague, penumbral bounds expressed by the standard of 'public interest.'"<sup>48</sup> The court needs only to satisfy itself that the Commission acted within bounds of its authority, that it followed its own procedural rules, that conclusions reached by the Commission do not deviate critically from their prior opinions without adequate explanation, and that it has "engaged in reasoned decision making."<sup>49</sup>

In *Citizen's Communication Center v. FCC*,<sup>50</sup> the court held that the Communications Act and *Ashbacker Radio Corp. v. FCC*<sup>51</sup> require a comparative hearing for all applicants to have their applications reviewed on all apposite standards, ". . . including plans for integration of minority groups into station operation."<sup>52</sup> In *TV 9*, the court flatly refused to accept the Commission's failure to afford consideration to minority ownership as a relevant factor in and of itself.<sup>53</sup>

In the most recent disposition of the *Garrett* case,<sup>54</sup> the court cited *TV 9*, saying that minority ownership of an applicant serving the community is a relevant consideration in selection of the proper applicant.<sup>55</sup> It also reiterated that “. . . minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, . . .” and merit should be awarded to that fact.<sup>56</sup>

In addition to these favorable decisions by the federal courts, the Citizen’s Communication Center, a public interest law firm dedicated to assisting citizens in improving broadcast service, continues its efforts to facilitate minority acquisition of broadcasting operations. The Center is currently petitioning the Federal Communications Commission to break down “clear” channels,<sup>57</sup> channels on which stations broadcast with wide coverage, taking advantage of several frequencies.<sup>58</sup> The Center seeks this breakdown in order to increase the number of radio broadcasting frequencies available and petitions the Commission to encourage minority ownership of these new facilities.<sup>59</sup>

### *Conclusion*

The obvious deficiency of Indian broadcasting results in a failure to meet a public need recognized by the Communications Act of 1934 as the prime purpose of broadcasting in the United States. The needs of Indian communities, resulting primarily from a language barrier, but partially from the barrier of isolation of Indian groups on reservation areas, and from the highly specialized nature of Indian information and culture, are best satisfied by the broadcast media.

The Federal Communications Commission has the authority to encourage Indian ownership by establishing additional criteria for license granting, renewal, and modification. The courts recognize that Indian ownership and participation will naturally result in broadcast programming responsive to the Indian minority requirements.

The FCC and its administrative operations have consistently declined to take affirmative action to encourage minority ownership. However, the continued efforts of Federal Communications Commissioner Benjamin Hooks and interest groups such as the Citizen’s Communications Center in Washington, D.C., are bringing about federal court decisions demanding that the FCC rescind its position on minority ownership.

Native American groups must assertively seek broadcasting licenses in good faith in order to fulfill the needs and interests of the Indian communities. These attempts must be made so that Indian broadcasting can expand to the extent required to satisfy the necessities of the Indian communities across the United States.

## NOTES

1. Survey of Indian Media Facilities, National Indian Education Ass'n, Minneapolis, Minn. (1975)
2. NEWSWEEK, Sept. 29, 1975, at 63.
3. T.V. DIGEST, June 30, 1975, at 26.
4. *Id.*
5. Survey of Indian Media Facilities, National Indian Education Ass'n, Minneapolis, Minn. (1975).
6. 47 U.S.C.A. § 308(a).
7. *Id.* § 309(a).
8. *Id.*
9. *Id.* § 313.
10. W. EMERY, BROADCASTING AND GOVERNMENT 231 (1971) [hereinafter cited as EMERY].
11. *Id.* at 233.
12. *Id.*
13. Financial qualifications are implied from Sections 308(a) and 319(a) of the Communications Act of 1934. In *W. H. Kindig*, 3 F.C.C. 313 (1936), the Commission stated that technical qualifications were an indispensable element in passing on every station license application.
14. EMERY, *supra* note 10, at 244.
15. 47 U.S.C.A. § 309(a)
16. *TV 9, Inc. v. FCC*, 495 F.2d 929, 937 (1973).
17. *Citizen's Communication Center v. FCC*, 447 F.2d 1201, 1213 n.36 (1971).
18. *Garrett Broadcasting Serv. v. FCC*, 33 R.R. 2d 1693, 1703 (1975).
19. *Id.*
20. *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16, 153 (D.C. Cir.) 305, *cert. denied*, 412 U.S. 922 (1972).
21. For example, KIPC broadcasts to a Native American population utilizing 19 Pueblo dialects in addition to English and Spanish. Broadcast License Application, Station KIPC, Albuquerque Public Broadcasting, Corp., Albuquerque, N.M. KNCC must deal with a problem of extreme isolation. Therefore, the station must not only provide Indian oriented informational programming, but also must serve as the primary source of entertainment for its audience. Broadcast License Application, Station KNCC, Navajo Community College, Tsaile, Ariz. KHAC proposed to make efforts to solve local problems of increasing juvenile delinquency, alcoholism, and deficient housing. Broadcast License Application, Station KHAC, Navajo Bible School and Mission, Inc., Window Rock, Ariz.
22. Broadcast License Application, Station KYUK-AM, Bethel Broadcasting, Inc., Bethel, Alas. Needs of the community include health and nutritional information, local sports coverage, and an outlet for native musical talent.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Broadcast License Application, Station KIPC, Albuquerque Public Broadcasting Corp., Albuquerque, N.M.
28. *Id.*
29. 47 U.S.C.A. § 312(a)(2).
30. *Alabama Education Television Comm'n*, 50 F.C.C.2d 461 (1975); *Stone v.*



- FCC, 466 F.2d 316 (1972).
31. Garrett Broadcasting Serv. v. FCC, 33 R.R.2d 1693 (1975).
  32. *Id.* at 1700.
  33. Mid-Florida Television Corp., 33 F.C.C.2d 34 (1970).
  34. *Id.* at 17, 18 (initial decision).
  35. *Id.* at 268
  36. Amendment of Commission Rules Relating to Multiple Ownership of Standard, FM and TV Stations, 50 F.C.C.2d 1046 (1975).
  37. Mid-Florida Television Corp., 33 F.C.C.2d 34 (1970).
  38. Chapman Radio & Television Co., 19 F.C.C.2d 157, 17 R.R. 2d 60 (1969).
  39. *Id.* at 183, 194.
  40. Mid-Florida Television Corp., 33 F.C.C.2d 34 (1970).
  41. TV 9, Inc. v. FCC, 495 F.2d 929, 936 (1973).
  42. *Evony*, June 1975, at 55.
  43. Amendment of Commission Rule Relating to Multiple Ownership of Standard, FM and TV Stations, 50 F.C.C.2d 1046 (1975).
  44. *Id.* at 1111.
  45. *Id.*
  46. *Id.*
  47. Garrett Broadcasting Serv. v. FCC, 513 F.2d 1056 (1975); TV 9, Inc. v. FCC, 495 F.2d 929 (1973).
  48. FCC v. RCA Communications, Inc., 346 U.S. 89 (1953).
  49. Fidelity Television, Inc. v. FCC, 515 F.2d 684 (1975).
  50. Citizen's Communication Center v. FCC, 463 F.2d 822 (1972).
  51. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).
  52. Citizen's Communication Center v. FCC, 463 F.2d 822, 823 (1972).
  53. TV 9, Inc. v. FCC, 495 F.2d 929, 938 (1973).
  54. Garrett Broadcasting Serv. v. FCC, 513 F.2d 1056, 1062, 1063 (1975).
  55. TV 9, Inc. v. FCC, 495 F.2d 929, 937 (1973).
  56. *Id.* at 938.
  57. Petitioner's Brief for Reconsideration, Amendment of Part 73 of the Commission's Rules Regarding AM Station Assignment Standards, No. 20265 (FCC Aug. 13, 1975).
  58. EMERY, *supra* note 10, at 111.
  59. Petitioner's Brief for Reconsideration, Amendment of Part 73 of the Commission's Rules Regarding AM Station Assignment Standards, No. 20265 (FCC Aug. 13, 1975).